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72-688

Supreme Court, U. S.
FILED
NOV 3 1972
MICHAEL RODAK, JR., CLERK

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-688

WHITE MOTOR CORPORATION, an Ohio Corporation, and FREIGHTLINER CORPORATION, a Nevada Corporation,
*Petitioners,*

VERSUS

FINIS STEWART and LEE WAY MOTOR FREIGHT, INC., a Delaware Corporation,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

C. J. WATTS
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219 Couch Drive
Oklahoma City, Oklahoma 73102
*Counsel for Petitioners*

October, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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VERSUS

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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Petitioners, White Motor Corporation, an Ohio Corporation, and Freightliner Corporation, a Nevada Corporation, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit entered August 11, 1972, and the order of the Court of Appeals overruling Petitioners' Petition for Rehearing on September 5, 1972.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit in this case (App. A) has not yet been reported.

The opinion of the court below denying Petitioners' Petition for Rehearing (App. B) was not reported.

The opinion of the District Court overruling the Motion for New Trial and Motion for Judgment Notwithstanding the Verdict, set forth in (App. C), was not reported.

## JURISDICTION

The final decree of the Court of Appeals was entered on August 11, 1972. (App. A, *infra*, p. A-12). A timely Petition for Rehearing was denied by order of September 5, 1972. The jurisdiction of the court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

The Court of Appeals nullified the basic rule of product liability, as recognized by other Circuit Courts, in holding that evidence of defective design, which had been specifically eliminated from the case in the trial court, would create an inference of a defect existing at time of transfer of the product sufficient to present a jury question, where the plaintiffs' evidence was otherwise completely speculative as to existence of defect, at time of delivery.

## STATEMENT OF THE CASE

This action by Finis Stewart, plaintiff, against defendant White Motor Corporation and Freightliner Corporation, seller and manufacturer of an alleged defective truck, for personal injuries, involves a one-vehicle accident, which plaintiff was driving on June 6, 1969, with Lee Way Motor Corporation, purchaser of the truck, appearing as an intervenor to cover workmen's compensation payments to plaintiff, as its employee. From a jury verdict of $350,000.00 in favor of the plaintiffs, the defendants filed Motions for Judgment Notwithstanding the Verdict and for New Trial upon the grounds that plaintiff had offered no evidence that a defect in bolts holding an equalizer bracket, as the alleged cause of the accident, had actually existed at the time of sale of the truck to Lee Way. The trial court's order overruling both motions on September 17, 1971 (App. C), in effect recognized the error and called upon the appellate court below for "close study" on appeal.

On June 6, 1969, at approximately 1:05 a.m., while driving the alleged defective truck for Intervenor Lee Way Motor Freight, Inc., in a southwesterly direction on the Will Rogers Turnpike, about four (4) miles east of Vinita Interchange, plaintiff was injured when the truck overturned after traveling along the edge of the road for approximately 1850 feet, turning abruptly to the right, then back to the left, and finally to the right again, overturning and resting on its left side, headed in the opposite direction.

Evidence was undisputed: 1) That the truck manufactured by Freightliner and sold by White to Lee Way more than one year before, had current mileage of 237,448

miles; 2) had been subjected to continuous and regular maintenance by the intervenor, including application of maintenance with heavy breakover wrenches to the bolts alleged to have been defective; and 3) that plaintiff's only evidence of cause of the failure was that the bolts must have sustained *either* excessive torque, excessive vibration from the bolts becoming loose, *or* defective bolts installed at the time of manufacture. The bolts and bracket had been disposed of by intervenor, and there was no effort to prove a metallurgical defect existing at time of delivery, or offer testimony concerning examination of the broken bolts or the bracket.

Although the question of "design defect," as injected by the Court of Appeals, was presented by the initial complaint of plaintiff, it was specifically withdrawn by plaintiff on the trial of the case, and the issue of design was not presented to the jury, nor was it a part of the trial court's judgment.

The plaintiff testified that he felt a vibration, took his foot off the accelerator, did not apply the brakes, and with difficulty held the truck on the shoulder to the right of the road until he finally lost control, and the truck changed directions and overturned, injuring his leg.

Lee Way employees testified that after the accident, the right equalizer bracket had broken from the frame and was hanging down with all five bolts broken, and three of them rusted. Plaintiff presented no expert testimony that the bolts were either defective at the time of installation by Freightliner, or delivery by White to Lee Way, or that the equalizer assembly, including the bolts, was improperly

designed. There was no testimony that the broken bolts were even the same ones installed in the truck by Freightliner when the truck was delivered one year and 237,448 miles prior to the accident.

Plaintiff's only expert witness, Professor Halley, Physicist, gave opinion evidence that failure of the bolts and falling of the equalizer bracket would have caused the truck to overturn, and the failure of the bolts could have resulted from: a) defective bolts; b) excessive torque on the bolts; c) lack of maintenance that could have permitted the bolts to come loose; or d) the force of the wreck. The witness admitted that he had no training or capability as an automotive engineer, and he had never seen or examined the bolts or equalizer bracket which were alleged to hav been the cause of the accident.

## REASONS FOR GRANTING THE WRIT

The decision of the court below is believed to be erroneous for the reason that the decision is in conflict with prior decisions in other circuits and the application of the rule of law set forth in the decision. The court below recognized the rule of law in product liability cases wherein "defect must be shown to exist at the time of delivery from the seller and manufacturer," but nullified the practical application of the rule, which is in conflict with other circuits, and further, the said decision is inconsistent with the ruling and the issues involved in the trial court.

The court below affirmed the judgment of the trial court in stating that the evidence as presented was suffi-

cient to draw the inferences of defectiveness in "design" of the bolts which produced the failure (App. A, p. A-9). The issue of design was not involved in the trial court's decision, as the transcript of record clearly and precisely sets forth that the issue of design to impose liability on the manufacturer was withdrawn from the case prior to the time that it was submitted to the jury for their determination. The court therefore has gone outside of the issues as presented on appeal, and has concluded from their examination of the evidence that a "rational and logical inference might be drawn" of defectiveness in the *design* and manufacture of the bolts involved in the truck some one year and 237,448 miles prior to the accident, when in fact, said issue was never presented to a jury, and was not part of the matter submitted on appeal. The petitioners herein are without remedy for relief from the unjust affirmance of the opinion, in that the petition for rehearing has been summarily denied by the court below.

The petitioners further suggest, as additional reason for granting the writ, that there is absolute lack of evidence to establish the recognized rule of law that defective condition must be proven at the time of delivery of the truck. The truck in question was sold to the respondent's employer some one year and 237,448 miles prior to the accident, and there was absolutely no evidence in the record to establish conclusively whether the defect in fact existed. Even though the rule of law is accurately set forth in the opinion of the court below as to the requirements, the conclusions as to the evidence are in severe conflict with other circuit courts in the application of the rule to the evidence which was submitted in the trial court. *H. W. Klein, Suc-*

*cessor in Interest to Dixie Drilling Co.* v. *Continental Emsco*, 5th Cir. 1971, 445 F.2d 629; *Ford Motor Co.* v. *McDavid*, 4th Cir. 1958, 259 F.2d 261; *Smith* v. *General Motors Corp.*, 5th Cir. 1955, 227 F.2d 210.

The court below has further completely refused to consider the most recent case in the State of Oklahoma decided subsequent to the appeal to the Court of Appeals, which would require reversal of the trial court's judgment. *Thompson* v. *Trane Co.*, April 11, 1972, 43 Okla. Bar Association Journal 1105, specifically sets forth the requirements to establish liability for a defective product in the State of Oklahoma, setting forth the rules and requirements disallowing conjecture or speculation relative to the evidence, and specifically restricting the courts or juries from guessing as to several different possible causes in establishing a defect. This most recent case requires probative evidence to establish the existence of the defect at the time of delivery from the manufacturer and seller, and prohibits speculation as between possible causes.

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Oklahoma City, Oklahoma 73102
*Counsel for Petitioners*

October, 1972

# APPENDICES

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## TENTH CIRCUIT

### JULY TERM, 1972

FILED
United States Court of Appeals
Tenth Circuit
AUG 11 1972
HOWARD K. PHILLIPS
Clerk

| | | |
|---|---|---|
| WHITE MOTOR CORPORATION, an Ohio corporation, and FREIGHTLINER CORPORATION, a Nevada corporation, Appellants, | ) | |
| v. | ) | No. 72-1040 |
| FINIS STEWART and LEE WAY MOTOR FREIGHT, INC., a Delaware corporation, Appellees. | ) | |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(D.C. No. CIV. 70-253)

Kent Fleming of Watts, Looney, Nichols & Johnson, Of Counsel, and Clyde J. Watts for Appellants.

Ben T. Lampkin and John W. Norman of Lampkin, Wolfe, Abel, McCaffrey & Norman for Appellee Finis Stewart.

Lawrence E. Hoecker of Pierce, Couch, Hendrickson, Gust & Short for Appellee (Intervenor) Lee Way Motor Freight, Inc.

[APPENDIX]

Before BREITENSTEIN, HILL and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This diversity action is a products liability case in which Oklahoma law of implied warranty of fitness for intended use was applied. Plaintiff-appellee Stewart, a long-haul truck driver for Lee Way Motor Freight, the intervenor-appellee, received serious injuries when his truck went out of control, left the highway and turned over. The incident occurred on a clear night in good weather while Stewart was driving a tractor-trailer combination which had been manufactured by defendant-appellant Freightliner Corporation and sold by it through White Motor Corporation to appellee's employer Lee Way.

Stewart testified that he experienced a sudden vibration and inability to control or steer the truck. He struggled with the steering wheel in a vain effort to prevent the truck from going hard to his right. He let up on the accelerator in an attempt to keep the vehicle on the roadway until it would roll to a stop from its 60 mile per hour speed, but after traveling 2000 feet it finally veered to the right and off the shoulder, reversed directions and overturned, landing on its left side.

Stewart was pinned in the wreckage for over an hour, his right leg being caught in the clutch pedal and his left leg lying out the door. He was hospitalized for 237 days with a compound fracture of the left leg and internal injuries consisting of a hole in the lower colon. He had very limited use of his leg; he presently wears a brace, walks with a cane, and cannot drive a truck. At the time of the trial there was a possibility that the leg might have to be amputated.

The evidence disclosed that there had been a failure in the right equalizer bracket-radius rod assembly of the

tractor's rear suspension system.[1] More particularly, the bolts holding the equalizer bracket to the frame were sheared off. An important factual issue was whether the bolts were overloaded or defective when possession was transferred from appellants to Lee Way or whether they had been overtorqued or had failed due to other improper maintenance on the part of Lee Way. Defendants also argued that Stewart had gone to sleep at the wheel and that the bolts were broken by the impact of the crash. Defendants' motion for directed verdict was denied.[2]

The jury returned a verdict for plaintiff in the amount of $350,000.00. Of this amount the intervenor Lee Way was allowed $21,951.22 by way of subrogation for workmen's compensation payments made to Stewart. Defendants moved for judgment NOV and for a new trial, both of which were denied.

There is a dispute in the evidence as to whether a manufacturer's defect produced this series of events. It was shown without dispute that after the truck came to rest, the so-called equalizer bracket-radius rod part of the tractor's rear suspension system was severed. The bolts which served to hold the equalizer bracket to the frame had sheared. Unfortunately the bolts were not preserved, but testimony was to the effect that three of the bolts were rusted suggesting that they may have failed prior to the incident while the fourth was shiny indicating that it had sheared off at the time.

The mentioned radius rod is a transverse member which connects to the axle and wheel assembly and serves to support the axle so as to prevent, in part at least, its swinging on a horizontal plane, the effect of which would

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[1] This assembly is essential to the guidance of the truck in that it keeps the dual rear axles of the tractor in line.

[2] Negligent design was also an issue but was abandoned by plaintiff before the case went to the jury.

be turning and loss of control.[3] Defendants offered testimony of tests which showed that the wheels did not swing even when the radius rod was dislodged.

The important factual issue at trial thus was whether the bolts were defective or overloaded at the time of sale and delivery of the truck to Lee Way or whether on the other hand the maintenance on the part of Lee Way had been faulty—whether, for example, Lee Way had overtorqued the bolts at regular 100,000 mile inspections. Defendants also have maintained that the bolts were broken by the impact of the crash. In addition to the radius rod there is a rear axle spring which gives limited and secondary support to the wheel assembly and also holds the wheels in a straight course. When the rod was separated on the right side this spring became dislodged and control of the rear wheels was lost. The tractor was just over a year old and had been driven 237,448 miles. The testimony showed that this is not regarded as high mileage. Trucks of this kind have an average life of a million miles over a period of five years. Supporting bolts such as those holding the radius rod bracket here are expected to last for the entire life of the truck.

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[3] Plaintiff's expert testified as follows:

A Yes, sir, there are several points of support on this rear axle. The rear axle is supported vertically with springs which lay right here just outside the frame of the vehicle. This, the vertical support, in other words, the weight of the tractor and the weight of the trailer and the load in the trailer is pushing down on the spring and then there is another linkage that ties this drive axle to the truck and this linkage sits on either side here and there is a heavy link called a radius rod that ties this back axle to the frame of the truck so you can have the push. In other words, the spring supports only the weight. There is nothing to keep the axle from moving back and forth and there has to be a rather heavy member to support the load. When you start driving, the power is applied to the drive wheels and if they weren't supported, they would tend to move out. But when you apply the brakes, they would stop and the vehicle would go on. Of course, you have a similar mechanism on the front axle, radius rod. This is the radius rod on the front axle mounted kind of at an angle to the one on the back.

The main contention on this appeal is, as has been noted, that of insufficiency of evidence to establish existence of a defect present in the equalizer bracket-radius rod assembly at the time of delivery. Defendants complain particularly about the disappearance of and failure to produce the bolts which failed.

Further challenges by defendants are first, the alleged excessiveness of the verdict; secondly, the failure of the trial court to submit the issue of contributory negligence of Lee Way to the jury; third, the alleged error of the court in not submitting the photograph of the equalizer bracket to the jury.

The evidence in support of proximate cause does not pose a problem. No strain on the deductive process is required to conclude that the failure of the bolts caused the truck to leave the highway, turn around and finally overturn. This is not only supported by the circumstances; the expert witness Halley gave a positive opinion that this occurred.

The evidence offered to establish the existence of a defect attributable to the defendants is less conclusive. The experts on both sides testified as to this but neither took a doctrinaire stand. Plaintiff's expert, Professor Halley, testified that inadequate shear strength or an overload on bolts which were too small or too few (a defect in design or manufacture) was the number one possibility. In addition, he conceded that there were other possibilities such as lack of maintenance and excessive torquing. The case was thus presented to the jury on circumstantial evidence, and the evidence must be determined sufficient or insufficient based on the strength of the inferences that defendants were responsible for the bolts failing.

In accordance with Oklahoma law,[4] the trial court charged the jury that the essential elements of an action

[4] Marathon Battery Company v. Kilpatrick, 418 P.2d 900, 902 (Okl. 1966) and Speed Fastners, Inc. v. Newson, 382 F.2d 395 (10th Cir. 1967).

based on manufacturer's or seller's breach of implied warranty of fitness required proof (preponderance of evidence) by the plaintiff that the claimed defect or defects constituting a breach of implied warranty of fitness existed at the time that the vehicle left the hands of the manufacturer or seller and must also prove that the claimed defect was the proximate cause of the accident and resulting injury or loss.[5]

I.

The Oklahoma law applicable to products liability cases proceeds on the doctrine of implied warranty of fitness for intended use. To recover, it must be established that there existed at the time of transfer from the manufacturer a defect which proximately caused the injury. Marathon Battery Company v. Kilpatrick, 418 P.2d 900, 902 (Okl. 1966). The Oklahoma Supreme Court said that a products case can be proven by either direct or circumstantial evidence:

> * * * The primary issue involved was whether the battery exploded, and this matter explicitly was submitted to and determined by the jury. We have held consistently that in civil cases the facts are provable by direct or circumstantial evidence, or by both. And it is not required that the proof rise to that degree of certainty which will support only one conclusion to the exclusion of all others. * * * 418 P.2d at 917.

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[5] The essential elements described by the court in its charge were:

FIRST: That the defendants breached an implied warranty of fitness with reference to said motor vehicle as claimed by the Plaintiff regarding the radius rod bracket and equalizer assembly of said motor vehicle and that each Defendant breached said implied warranty of fitness prior to the time it relinquished possession or control over said motor vehicle, and,

SECOND: That said breach of an implied warranty of fitness in connection with the radius rod bracket and equalizer assembly involved was a proximate cause of the accident involved and any personal injuries or losses which may have been sustained as a result thereof.

The court also said:

> We are persuaded as to the correctness of both the reasoning and the rule, and hold the manufacturer's liability was established when it was shown that plaintiff was injured while using the battery for the purpose intended by reason of a defect as to which he was not aware, and could not have ascertained by examination. 418 P.2d at 915.

In Marathon Battery the proof of plaintiff was practically limited to the inferences arising from the happening. The battery manufactured by defendant exploded while plaintiff was holding it in his hand. The opposing argument that the specific reason for the failure had to be established was rejected. The circumstantial evidence was held to be sufficient to create a reasonable inference that som defect existed in the battery. Defendant's theory that the explosion resulted from some external agency or force was rejected by the jury.

In Ford Motor Co. v. Schweitzer, No. 43096 (Okl. June 15, 1971), a case which resembles ours, there was a failure of the tie rod assembly in the steering mechanism. A witness at the scene noticed that it was rusty except for one shiny spot on the end. There was little other proof. There, however, the car was only 12 days old, making the connection to the manufacturer somewhat more clear. This court's decision in Speed Fasteners, Inc. v. Newson, 382 F.2d 395 (10th Cir. 1967) interpreted Oklahoma law and is thus pertinent. The injury in that case resulted from the use of a powder-loaded gun in driving studs through a steel I-beam. The head of one of these studs separated from the shank and the ricocheting shank hit plaintiff and imbedded itself in his midsection. The possible explanations were overcharge of powder, improper handling, or a defect in the stud. Expert testimony showed that the tensile strength of the stud was below optimum hardness, but the expert was not positive that this condition accounted for the failure.

This court in affirming the judgment noted that in *Marathon* ". . . no defect was shown . . . [the battery] simply exploded."

These cases teach that the presence of a defect can be connected to the manufacturer or seller by circumstantial evidence which is logical and reasonable; at the same time the inferences need not exclude all other possibilities, and the testimony of the expert need not be limited to a single explanation.

II.

The trial court properly instructed the jury that the mere happening of an accident carries with it no presumption of breach of implied warranty but that the burden is on the plaintiff to establish the breach by a preponderance of the evidence.

This, of course, does not preclude a consideration of the actual occurrence and of the surrounding circumstances insofar as these explain the origin of a defect.

The truck was relatively new in relation to its life expectancy. The area was not one in which heavy maintenance was required. The bolts are expected to continue for the life of the truck. There had been checks at 100,000 mile intervals. About one in twenty-five requires tightening at the 100,000 mile check. When the bolts are tightened in Lee Way shops, the mechanics do not use a wrench which is calibrated. However, according to the evidence, a good mechanic can tighten such a bolt to within ten or fifteen pounds. The specification in the manual calls for 90 pounds of torque, but the bolt, according to the manual, can tolerate as much as 150 pounds. The evidence of plaintiff stressed the difficulty of reaching this point. There was no showing that any of the bolts here had been in fact tightened; proof did show that the bolts are visually checked and tested and are tightened if need is found.

The bolts were shown to have sheared, and there was no showing that they had loosened, and thus the only competing or countervailing inference was that of overtorquing. Further, there was a lack of evidence that the bolts had been replaced. Lee Way showed that they infrequently substituted bolts and that when they did so they installed stronger ones.

From these basic facts it is logical to infer that it was the defectiveness in design or manufacture of the bolts which produced the failure.

While the evidence is not open and shut, and indeed it is not as strong as that which was present in *Marathon*, where the happening bespoke a defect, or as strong as that in *Speed Fastner*, where the activity was so hazardous to render the slightest deviation from precise standards a defect, we nevertheless cannot say that the trial court erred in holding that a trier of fact could justifiably conclude that the plaintiff's thesis that the manufacturer supplied a defective equalizer bracket-radius rod assembly was more likely so than not so. There is present a logical and rational inference that the manufacturer and seller were responsible for the defect.

## III.

## THE CONTENTION THAT THE DAMAGE AWARD WAS EXCESSIVE

The applicable standard for judging excessiveness is stated in Chicago, Rock Island & Pacific Railway Co. v. Kifer, 216 F.2d 753 (10th Cir. 1954):

> Our province is limited to determining whether the trial court, in denying the motion, abused its discretion. Ordinarily, it will not be held that the trial court abused its discretion in denying a motion for new trial on the ground that the verdict was excessive, unless it affirmatively appears that it resulted from bias, prejudice, or passion. 216 F.2d at 756-757.

It was here stipulated by the parties that an officer of Lee Way would, if called, testify that Stewart's temporary earning loss from the time of the accident to the trial was $31,178.00; his future earnings based on his 1971 pay rate would have been $395,520.00 ($16,480.00 per year for 24 years). It was also agreed that any sum of money awarded could earn five percent per annum. The trial court instructed the jury in accordance with the stipulation and, in particular, told the jury that it should discount the award for future earnings by the five percent rate in view of cash payment. The evidence as to medical and hospital expenses incurred was $17,411.72; future medicals were estimated to be $22,500.00.

There was evidence that plaintiff suffered pain. He was pinned in the wreckage for over an hour and suffered continuing pain from the deformity of the leg and the numerous skin grafts which were required. At least some part of the award could have been for pain and suffering.

Defendants argue for the first time on appeal that plaintiff in the future could obtain some kind of employment and that this would reduce the future loss of earnings. But the doctor called by plaintiff testified that Stewart was totally disabled and that continued use of a leg apparatus was foresecable. There also was the possibility of amputation and the substitution of an artificial leg. Defendants produced no testimony of their own on the issue of damages and did not make an issue of or ask for an instruction as to offsetting future earnings.

The award was not so excessive as to suggest that it was based on prejudice and so as to call for a ruling that the trial court erred in refusing to set aside the verdict.

## IV.

## THE QUESTION WHETHER CONTRIBUTORY NEGLIGENCE OF LEE WAY COULD BAR ITS RECOVERY

The defendants were refused an instruction which would have told the jury that a finding of contributory negligence by Lee Way would bar any recovery by it.

Lee Way had intervened so as to protect its right to share in any award gained by its employee, to the extent of the workmen's compensation payments. Under Oklahoma law the payer of the workmen's compensation benefits is subrogated to the claim of the injured workman against the tortfeasor. See Travelers Insurance Company v. Leedy, 450 P.2d 898 (Okl. 1969). This court has previously held that in Oklahoma contributory negligence of the employer is no defense ~~in~~ a direct action (which this was not) for recovery of compensation payments, since contributory negligence of the employer would not be a defense in an action by the employee. Baker v. Traders & General Insurance Co., 199 F.2d 289 (10th Cir. 1952). There is no suggestion in *Baker* that this principle changes when the employer rather than his insurance carrier exercises the right to recoup the payments required by the Oklahoma Workmen's Compensation Act, and there is no indication that the Oklahoma Supreme Court would so hold. In each instance the claimant stands in the shoes of the injured person.

## V.

## REFUSAL OF THE TRIAL COURT TO SUBMIT TO THE JURY THE PHOTOGRAPH OF THE EQUALIZER BRACKET

A photograph of the equalizer bracket showing its severed bolts and the rust on the ends of three of them was taken at the scene of the accident. Plaintiff attempted to get this photograph into evidence, but it was excluded

as a result of the defendants' objection that an identification witness was not present. However, the photo was used by the plaintiff's expert for the purposes of his testimony, and this was not objected to. In fact, the defendants used the photograph for the purpose of cross-examining Halley. Nor was there any mention of this point when the case went to the jury. Under the circumstances, we perceive no error in the court's refusal to comply with defendants' belated request that the photograph be submitted.

The judgment is affirmed.

## APPENDIX B

### JULY TERM—SEPTEMBER 5, 1972

Before Honorable David T. Lewis, Chief Judge; and Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges.

| | | |
|---|---|---|
| WHITE MOTOR CORPORATION, an Ohio corporation, and FREIGHTLINER CORPORATION, a Nevada corporation, Appellants, | ) | |
| v. | ) | No. 72-1040 |
| FINIS STEWART and LEE WAY MOTOR FREIGHT, INC., a Delaware corporation, Appellees. | ) | |

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed the appellants in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Breitenstein, Hill and Doyle to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Ruly 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Holloway, Circuit Judge, not participating.

s/ Howard K. Phillips
HOWARD K.. PHILLIPS, Clerk.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
SEP 16 1971
REX B. HAWKS
Clerk, U. S. District Court
By GLADYS W. JANIS
Deputy

| | | |
|---|---|---|
| FINIS STEWART, Plaintiff, | ) | |
| -vs- | ) | Case No. 70-253 Civil |
| WHITE MOTOR CORPORATION, an Ohio corporation, and FREIGHTLINER CORPORATION, a Nevada corporation, Defendants. | ) | |
| LEE WAY MOTOR FREIGHT, INC., a Delaware corporation, Intervenor. | ) | |

### ORDER

In this products liability case Plaintiff recovered a $350,000 verdict at the hands of a jury against the maker and seller of a truck. A small portion thereof enures to the benefit of the Intervenor by way of subrogation, it, as Plaintiff's employer, having paid Plaintiff such sum under the Workmen's Compensation Law of Oklahoma as a result of the accident involved herein. Defendants now move for judgment notwithstanding the verdict and move for a new trial.

The case and verdict are based on alleged breach of implied warranty. A negligence count (as to design) was abandoned by Plaintiff at the close of the trial. Plaintiff

was driving a truck manufactured by the Defendant Freightliner Corporation which was sold by the Defendant White Motor Corporation to the Intervenor Lee Way Motor Freight, Inc. As his co-driver was asleep in the sleeper and the Plaintiff was driving on an Oklahoma turnpike late at night said truck ran off the road and overturned. A broken radius rod assembly bracket was found after the accident. It was Defendants' contention that the cause of the accident was due to the Plaintiff going to sleep or the manner in which the Intervenor tightened the bolts on said bracket.

Defendants generally claim by their Motions under consideration, first, that the Plaintiffs' evidence failed to establish the existence of a defect in the truck which was a proximate cause of the accident at the time Defendants passed control thereof to the Intervenor. Defendants also complain that a photograph of one of the affected parts of the truck was not identified and offered in evidence by the Plaintiff even though certain witnesses testified from the same. Defendants next complain that the verdict was excessive and, lastly, that the Court erred in refusing an instruction that contributory negligence on the part of the Intervenor would preclude any recovery by it from the Defendants.

As to the first complaint, the Court had considerable concern during the trial and still does that the Plaintiff used a proper type of expert witness and presented any evidence that a proximate cause of the accident was a defect in the truck chargeable to the Defendants at the time of delivery under the implied warranty doctrine. Even though a case founded on breach of implied warranty (strict liability) does not require proof of privity or negligence, the Plaintiff's proof must show that he has been injured by a defective product and mere possibility is not enough. However, under the pronouncements of *Marathon Battery Company* v. *Kilpatrick*, 418 P. 2d 900 (Okl. 1965); *Ford Motor Company* v. *Schweitzer, a minor, et al.*, Case No. 43096 before the Oklahoma Supreme Court, *The Jour-*

*nal* (published by the Oklahoma Bar Association) dated June 19, 1971, page 1577, Vol. 42 No. 23; *Speed Fastners, Inc.* v. *Newsom*, 382 F. 2d 395 (Tenth Cir. 1967) and *Henningsen* v. *Bloomfield Motors, Inc.*, 161 A. 2d 69 (NJ 1960), the Court in overruling this contention of Defendants, invites a close study of the matter by the Circuit Court on appeal and would not be disturbed by a reversal of the case on this ground.

As to the second complaint, the photograph (marked Plaintiff's Exhibit No. 6) was offered in evidence by the Plaintiff at which time the Court inquired of Defendants if they had any objections. The Defendants expressed doubt as to adequate identification but stated they would have no objection to the witness then on the stand pointing out on this picture for illustration what he saw, provided, that the photograph would be properly identified. Counsel for Plaintiff concurred and proceeded to follow this procedure with the witness on the stand.[1] In view of the foregoing

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[1] The transcript reveals this discourse on this point:

"BY MR. NORMAN

Q Mr. Fortsberry, I will hand you what has been marked as Plaintiff's Exhibit Number 6 and is that the lower half of the bracket that you observed at the scene of the accident?

A Yes, sir.

Q Alright. And does it depict the bolts and rust that you described?

A Yes, sir.

Q Just as you recall them from this?

A Yes, sir.

Q We will offer Plaintiff's Exhibit Number 6.

THE COURT: Any objections?

MR. WATTS: I doubt this is adequate identification, but I am convinced that this is the picture of the same bracket. It is not the bracket its self. This is just the top of the bracket. I would, if we can describe what it is, I will have no objections to it and where it came from, I would like a little more history on it.

THE COURT: Well, since this witness didn't make the picture, it is only proper for him to testify that what he saw was correctly portrayed in that picture.

the Court did not admit the photograph in evidence, considered that there had been an objection by Defendants to the same and further considered that the parties had agreed on a procedure to be followed in connection with said photograph. Thereafter this exhibit was freely used by all parties as they solicited testimony from various witnesses and did so without objection. A further renewed offer to admit the exhibit in evidence was not made by any of the parties and therefore the exhibit was not admitted in evidence because of the aforementioned objection, the understanding reached by the parties as to how to proceed with reference to the photograph and the failure of any of the parties thereafter to renew or make a further offer of the exhibit into evidence. The jury desired to see the photograph during its deliberations but as it was not an exhibit admitted in evidence by the Court, the Court had no choice but to advise the jury that the photograph was not in the evidentiary record before them. This jury request was discussed with the attorneys and no objection was made to the response of the Court to the request of the jury. The cases cited by the parties are not in point. The point involved is that a photograph was used by witnesses in connection with their testimony without objection and in fact by agreement but the same was never finally offered in

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[1] (Continued)

MR. WATTS: I would agree—I am sure counsel cannot identify it. I would have no objections to him pointing out on this picture for illustration what he saw provided we can have an understanding that the picture will be properly indentified. (sic) That would save a little time.

THE COURT: Very well.

BY MR. NORMAN:

Q Alright. Taking this crayon then, will you draw a circle around, a large circle so you don't draw over the shinney (sic) bolt that you observe.

Alright. And the other bolts there are the ones you observed to be rusty?

A Yes, sir."

evidence by anyone. The Defendants are in no position to complain about this exhibit not being admitted in evidence by the Court. This is so for the exhibit would have been admitted in evidence had they not objected when the same was offered by the Plaintiff. Moreover, if the Defendants thereafter felt themselves prejudiced with references to this photograph not being again offered and admitted in evidence all they needed to do was to themselves offer the same in evidence and it would have been admitted by the Court as it had been identified as a photo of a broken part taken shortly after the accident and represented the true and accurate condition thereof after the accident. No error is believed to exist in these circumstances.

As to the third complaint, the Court does not feel that the verdict is excessive under the evidence in view of Plaintiff's considerable pain and suffering, severe permanent injuries and loss of future earning capacity to result therefrom and considerable medical and hospital expenses. The verdict is believed to be in proper range under the evidence.

As to the last complaint, the Court did not give the requested instruction because of a legal pronouncement of our Circuit. If this refusal be error our Circuit will have to reverse itself as this proposition is viewed by the Court. See *Baker* v. *Traders & General Ins. Co.*, 199 F. 2d 289 (Tenth Cir. 1952). Also see *Houk* v. *Arrow Drilling Company*, 439 P. 2d 146 (Kan. 1968).

Defendants' Motions are each overruled this 16th day of September, 1971.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-688

WHITE MOTOR CORPORATION, an Ohio Corporation, and FREIGHTLINER CORPORATION, a Nevada Corporation,
*Petitioners,*

VERSUS

FINIS STEWART and LEE WAY MOTOR FREIGHT, INC., a Delaware Corporation,
*Respondents.*

**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## INTRODUCTION

This brief is in opposition to the petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Petitioners apparently contend that the trial court below and the Tenth Circuit both failed to correctly apply the law of implied warranty to the facts of this case. Conceding that the Tenth Circuit has correctly stated the law, petitioners allege there should have been a different result. In respondents' opinion, petitioners are again arguing the facts which were decided against them in the trial and against them in the Tenth Circuit. The rule of law and the result reached is consistent with other cir-

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cuits and with the applicable state law. Under the applicable rules governing a petition for Writ of Certiorari, this petition should be denied.

## A.
## REFERENCE TO OPINIONS OF COURTS BELOW

Respondents are satisfied with the presentation of this item by petitioners.

## B.
## GROUNDS FOR INVOKING JURISDICTION

Respondents are satisfied with the presentation of this item by petitioners, except that petitioners did not set out the language of the Statute relied upon, 28 U.S.C. 1254 (1), as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

## C.
## QUESTIONS PRESENTED FOR REVIEW

Respondents are not satisfied with petitioners' presentation of this item, and therefore, present the following statement.

Although Section 1254 (1), *supra*, provides that jurisdiction of this Court may be invoked by a petition for certiorari, the applicable considerations governing review on

certiorari are set out in United States Supreme Court Rule 19(1)(b), 28 U.S.C.A., as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered
>
> * * * * * *
>
> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

Therefore, the respondents consider the questions presented for review to be:

1. Whether the decision below is contrary to the decsions of other circuits, or
2. Whether the decision below is contrary to the applicable state law.

## D.
## STATUTE WHICH THE CASE INVOLVES

Because petitioners did not make reference to 28 U.S.C. 1332 (the Statute which the case involves), it is set out herein:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between—
>
> "(1) citizens of different States."

## E.
## STATEMENT OF FACTS

The statement of facts as presented by petitioners is considered by respondents to be at least an adversary statement, if not inaccurate. Because it is inconsistent with the record and inconsistent with the facts as set forth in the opinion of the Circuit Court below, the respondents adopt the statement of facts as set forth in the Circuit Court's opinion.

"DOYLE, Circuit Judge.

"This diversity action is a products liability case in which Oklahoma law of implied warranty of fitness for intended use was applied. Plaintiff-appellee Stewart, a long-haul truck driver for Lee Way Motor Freight, the intervenor-appellee, received serious injuries when his truck went out of control, left the highway and turned over. The incident occurred on a clear night in good weather while Stewart was driving a tractor-trailer combination which had been manufactured by defendant-appellant Freightliner Corporation and sold by it through White Motor Corporation to appellee's employer Lee Way.

"Stewart testified that he experienced a sudden vibration and inability to control or steer the truck. He struggled with the steering wheel in a vain effort to prevent the truck from going hard to his right. He let up on the accelerator in an attempt to keep the vehicle on the roadway until it would roll to a stop from its 60 mile per hour speed, but after traveling 2000 feet it finally veered to the right and off the shoulder, reversed directions and overturned, landing on its left side.

"Stewart was pinned in the wreckage for over an hour, his right leg being caught in the clutch pedal and

his left leg lying out the door. He was hospitalized for 237 days with a compound fracture of the left leg and internal injuries consisting of a hole in the lower colon. He had very limited use of his leg; he presently wears a brace, walks with a cane, and cannot drive a truck. At the time of the trial there was a possibility that the leg might have to be amputated.

"The evidence disclosed that there had been a failure in the right equalizer bracket-radius rod assembly of the tractor's rear suspension system.[1] More particularly, the bolts holding the equalizer bracket to the frame were sheared off. An important factual issue was whether the bolts were overloaded or defective when possession was tranferred from appellants to Lee Way or whether they had been overtorqued or had failed due to other improper maintenance on the part of Lee Way. Defendants also argued that Stewart had gone to sleep at the wheel and that the bolts were broken by the impact of the crash. Defendants' motion for directed verdict was denied.[2]

"The jury returned a verdict for plaintiff in the amount of $350,000.00. Of this amount the intervenor Lee Way was allowed $21,951.22 by way of subrogation for workmen's compensation payments made to Stewart. Defendants moved for judgment NOV and for a new trial, both of which were denied.

"There is a dispute in the evidence as to whether a manufacturer's defect produced this series of events. It was shown without dispute that after the truck came to rest, the so-called equalizer bracket-radius rod part of the tractor's rear suspension system was severed.

---

[1] This assembly is essential to the guidance of the truck in that it keeps the dual rear axles of the tractor in line.

[2] Negligent design was also an issue but was abandoned by plaintiff before the case went to the jury.

The bolts which served to hold the equalizer bracket to the frame had sheared. Unfortunately the bolts were not preserved, but testimony was to the effect that three of the bolts were rusted suggesting that they may have failed prior to the incident while the fourth was shiny indicating that it had sheared off at the time.

"The mentioned radius rod is a transverse member which connects to the axle and wheel assembly and serves to support the axle so as to prevent, in part at least, its swinging on a horizontal plane, the effect of which would be turning and loss of control.[3] Defendants offered testimony of tests which showed that the wheels did not swing even when the radius rod was dislodged.

"The important factual issue at trial thus was whether the bolts were defective or overloaded at the time of sale and delivery of the truck to Lee Way or whether on the other hand the maintenance on the part of Lee Way had been faulty—whether, for example, Lee Way had overtorqued the bolts at regular 100,000 mile inspections. Defendants also have maintained that the bolts were broken by the impact of the crash. In addition to the radius rod there is a rear axle spring which gives limited and secondary support to the wheel assembly and also holds the wheels in a straight course. When the rod was separated on the right side this spring became dislodged and control of the rear wheels was lost. The tractor was just over a year old and had been driven 237,448 miles. The testimony showed that this is not regarded as high mileage. Trucks of this kind have an average life of a million miles over a period of five years. Supporting bolts such as those holding the radius rod bracket here are expected to last for the entire life of the truck.

* * * * * *

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[3] [Footnote omitted.]

"The truck was relatively new in relation to its life expectancy. The area was not one in which heavy maintenance was required. The bolts are expected to continue for the life of the truck. There had been checks at 100,000 mile intervals. About one in twenty-five requires tightening at the 100,000 mile check. When the bolts are tightened in Lee Way shops, the mechanics do not use a wrench which is calibrated. However, according to the evidence, a good mechanic can tighten such a bolt to within ten or fifteen pounds. The specification in the manual calls for 90 pounds of torque, but the bolt, according to the manual, can tolerate a much as 150 pounds. The evidence of plaintiff stressed the difficulty of reaching this point. There was no showing that any of the bolts here had been in fact tightened; proof did show that the bolts are visually checked and tested and are tightened if need is found.

"The bolts were shown to have sheared, and there was no showing that they had loosened, and thus the only competing or countervailing inference was that of overtorquing. Further, there was a lack of evidence that the bolts had been replaced. Lee Way showed that they infrequently substituted bolts and that when they did so they installed stronger ones."

## F.
## REVIEW OF THE JUDGMENT OF STATE COURT

Review of state court judgment is not sought, and therefore, this item is not applicable.

## G.
## BASIS FOR FEDERAL JURISDICTION

See D, *supra*.

## II.

## ARGUMENT

**PROPOSITION: THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS NEITHER IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS ON THE SAME MATTER, NOR CONTRARY TO APPLICABLE STATE LAW, AND THEREFORE, THE PETITION FOR CERTIORARI SHOULD BE DENIED.**

### A. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF OTHER CIRCUIT COURTS ON THE SAME MATTER, AND THEREFORE, THE PETITION FOR CERTIORARI SHOULD BE DENIED.

#### 1. The decision does not conflict with decisions of other circuits.

Petitioners cite *Ford Motor Company* v. *McDavid*, 259 F.2d 261 (4th Cir. 1958), a 1958 Fourth Circuit case, and argue that it is in conflict with the decision below. However, the *McDavid* decision is based upon *negligence*, as shown by the following language from that decision:

> "He [the plaintiff] sought compensation for his personal injuries from the manufacturer of the automobile upon the theory that the blowout was caused by excessive wear of the tire which, in turn, was attributable to the *negligence* of the manufacturer in aligning the wheel." *Id.*, at 262. (Emphasis added.)
>
> * * * * * *
>
> ". . . all of the controls of the toe-in, as set in the factory, were completely removed and replaced by others. *Id.*, at 263.
>
> * * * * * *
>
> "All that is known with certainty is that it [improper alignment] was not caused by the defendant,

for, whatever Ford did to set the toe-in, it was completely undone by Clem Davis, Inc." *Id.*, at 265.

The case is thus distinguished on its law (negligence) and its facts (clear proof of alteration by others).

Petitioners also cite *Smith* v. *General Motors Corporation*, 227 F.2d 210 (5th Cir. 1955), and *Klein* v. *Continental-Emsco*, 445 F.2d 629 (5th Cir. 1971), and urge that they are in conflict with the decision below. However, *Smith*, like *McDavid, supra*, is a negligence case, and not an implied warranty case. The Court wrote, at page 210:

> "This appeal from a directed verdict for the defendant in a *negligence* action presents the question of how clear a case plaintiff must show by circumstantial evidence in order to establish a jury question. . . ." (Emphasis added.)

The plaintiff had been killed in the accident, and there were no eyewitnesses. This case is likewise distinguished on the law and the facts.

The *Klein* case is a property damage case, which did involve implied warranty. There were three defendants: (1) Westinghouse Air Brake Company, (2) General Electric, and (3) Continental-Emsco. The air brake which was alleged to be defective was manufactured by Westinghouse, but installed into a Continental-Emsco console. The jury verdict was against Westinghouse, but for General Electric and Continental-Emsco. The trial court then sustained Westinghouse's motion for judgment notwithstanding the verdict, and plaintiff appealed.

In affirming the trial court, the Fifth Circuit noted:

"... there is a complete absence of evidence tending to show that the main air valve was defective when Westinghouse sold it to Continental-Emsco.

• • • • • •

"Westinghouse, whose valves were necessarily meddled by Continental-Emsco in its creation of the console, simply cannot be held liable solely upon the basis of a doctrine [the sealed-container rule] aimed at the fabricator of an integrated unit." *Id.*, at 631.

The radius rod in the instant case had not been integrated into a console by another defendant, and therefore this case is distinguished on its facts.

Therefore, the cases cited by petitioners do not support the propositions petitioners urge.

**2. The decision of the Tenth Circuit is consistent with other Circuit Court decisions.**

Because petitioners cited two Fifth Circuit cases, it is important to note the existence of three other Fifth Circuit cases which support and are consistent with the decision of the Tenth Circuit below.

In *Franks* v. *National Dairy Products Corp.*, 414 F.2d 682 (5th Cir. Tex. 1969), the plaintiff brought an action based upon breach of implied warranty for injuries he received when grease manufactured by the defendant exploded, covering his hands, arms, face and shoulders, and burning him severely. The plaintiff testified as to proper use of the grease. He testified that the can into which he was draining the grease was dry when he started the drain-

ing process. The Court found that such evidence was enough to find that the plaintiff had negatived improper use or handling, and that there was no water or foreign liquid in the container at the time of explosion as the defendant had contended. On appeal the defendant argued that the Court, in finding for the plaintiff, had been clearly erroneous because no specific defect had been proved. The Circuit Court flatly rejected this argument stating that:

"Admittedly, a specific defect was not proved. . . ."

Notwithstanding this fact, however, the Circuit Court upheld the decision of the trial court.

The Fifth Circuit also dealt with the area of products liability in *American Motors Corporation* v. *Mosier*, 414 F.2d 34 (5th Cir. 1969). Plaintiff in this action obtained recovery for injuries sustained in an automobile accident which he claimed was a result of a defect in the cross-linkage tube portion of the steering linkage assembly in his automobile.

On appeal the defendant argued that the defect was not shown to be present at the time of sale. Defendant challenged that proof on the question was made only by speculation, guess and conjecture, arguing that any finding for the plaintiff would have to be done by placing an inference upon an inference. The Court answered that argument and affirmed:

"The thing which appellants fail to realize is that the same circumstantial facts which the trial judge used in deducing or inferring the conclusion that the defect preceded the accident and upon which there was direct testimony, i.e., circumstantial evidence,

> may also be used as some of the premises necessary to deduce that the defect existed at the time of the sale. After all, the sale too preceded the accident."

In *Remington Arms Co., Inc.* v. *Wilkins*, 387 F.2d 48 (5th Cir. Ala. 1967), the plaintiff sought recovery for injuries incurred when a cartridge exploded in his face after it had failed to fire in his rifle. The Court recognized the Alabama rule which holds that a manufacturer who, without notice of its character or quality, supplies or delivers to another a machine or article which at the time of delivery, he knows to be imminently dangerous to the life or limb of anyone who may use it for the purpose which it is intended, is liable to anyone who sustains injury from its dangerous condition, whether he has any contractual relation with him or not. The Court also recognized the Alabama rule as to proof of defect, stating:

> "Contrary to the appellant's contention, the doctrine of manufacturer's liability does not require proof of a specific defect in the article itself." *Id.*, at 50.

The case included the plaintiff's testimony as to how the accident happened and testimony by Civil Defense experts that it could not have happened in that manner. In spite of the conflicting testimony, the Court found that a question was raised for the jury as to the liability on the part of the manufacturer.

These three decisions support and are consistent with the policy, with the rationale, and with the rule and its application in the decision of the Tenth Circuit below.

**3. Any conflict or "difference" of Circuit Court decisions which exists because of a difference in state law is a permissible "difference" in Circuit decisions and is not a conflict on the same matter, and therefore is not grounds for granting a petition for a writ of certiorari.**

A conflict or "difference" in Circuit Court decisions is not ground for issuance of a writ of certiorari, except when the conflicting decisions involve the "same matter." United States Supreme Court Rule 19(1)(b). A conflict in state court decisions (the applicable state law) which therefore results in a "difference" in federal appellate court decisions which are based upon state law does not therefore involve a conflict "on the same matter." *See*, "Right to Certiorari on the Grounds of Conflict Among Federal Circuit Courts Arising from the Duty to Follow State Court Decisions," p. 535 of "State Court Decisions as Rule of Decision in Federal Courts Since the Overruling of the Doctrine of *Swift v. Tyson*." 83 L.Ed. 519 (1939). The conflict or "difference" is merely a corollary to a permissible difference of opinion in the state courts, by the adjudication of which the federal courts sitting in the various states are bound. Consequently, a writ of certiorari will not be granted by the United States Supreme Court. See also, *Ruhlin* v. *New York Life Insurance Company*, 304 U.S. 202 (1938).

The decisions discussed in Sub-Propositions 1 and 2 above are not in conflict with the decision below, but, indeed, support the decision of the Tenth Circuit. But even if this were not true, *i.e.*, if they were contrary, a contrary decision of another circuit would mean only that the law of that state was different. That is to say, where Circuit

Courts decide appeals upon state law, the difference in decisions means no more than that the state laws differ. For this additional reason, the petition for a writ of certiorari should be denied.

**B. THE TENTH CIRCUIT DECISION BELOW IS NOT CONTRARY TO APPLICABLE STATE LAW, AND THEREFORE THE PETITION FOR CERTIORARI SHOULD BE DENIED.**

Petitioners argue that the decision of the Tenth Circuit below is in conflict with the applicable state law, and specifically they argue that it is contrary to the case of *Thompson* v. *The Trane Company*, 43 O.B.A.J. 1105 (Okla. 1972).

Since 1965, four major decisions of the Oklahoma Supreme Court and two decisions of the United States Court of Appeals for the Tenth Circuit, construing Oklahoma law, have enunciated, expanded and clarified the law of products liability in Oklahoma. Those cases are:

1. (1965) *Marathon Battery Co.* v. *Kilpatrick*, 418 P.2d 900 (Okla. 1965);
2. (1967) *Speed Fasteners, Inc.* v. *Newsom*, 382 F.2d 395 (10th Cir. Okla. 1967);
3. (1968) *Barnhart* v. *Freeman Equipment Co., Inc.*, 441 P.2d 993 (Okla. 1968);
4. (1971) *Vaughn* v. *Chrysler Corporation*, 442 F.2d 619 (10th Cir. Okla. 1971);
5. (1971) *Ford Motor Co.* v. *Schweitzer*, 42 O.B.A.J. 1577 (Okla. 1971);
6. (1972) *Thompson* v. *The Trane Co.*, 43 O.B.A.J. 1105 (Okla. 1972).

These six cases, construed in light of each other, and studied along with *Greenman* v. *Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963) (the decision upon which *Marathon* drew heavily), establish the law for Oklahoma in products liability cases.

In Oklahoma, when a person is injured while using a product for the purposes intended, by reason of a defect of which he was not aware, he has established a *prima facie* case of breach of implied warranty. No *direct* evidence of the precise nature of the defect is required. That a defect existed may be proven by circumstantial evidence and may be inferred from the failure of the product. When all the evidence is considered in a light most favorable to the plaintiff, if all reasonable men would agree that the probability the failure resulted from a defect existing when the product left control of the defendant is greater than the probability the failure resulted from some means outside and beyond the area of defendant's responsibility, then the case must be submitted to the jury for decision.

In *Thompson*, the plaintiffs brought an action for property damage based upon a claim that a gas heating unit was defective when transferred from the manufacturer to the seller and installed in plaintiffs' home which was subsequently damaged by a fire, the origin of which was traced to a leak in the unit. At the conclusion of all the evidence, the trial court sustained the demurrer of the manufacturer and seller of the unit.

Although the unit had been installed in a closet-type opening in one of the interior hallways of the home, "the actual hooking-up of the unit to the electrical and gas con-

nections was to be done by other people employed by plaintiffs" (*Id.*, at 1105). The plaintiffs' plumber had attached the gas supply pipe. On the connection to which this supply pipe was connected, there was a warning by the manufacturer that improper connection could cause damage. The plaintiffs' plumber and employee did not testify that the connection was proper. Thus, the trial court and the Supreme Court properly held that, without such evidence, it was just as likely that the gas leak was caused by some means outside and beyond the area of defendant's responsibilities, *e.g.*, improper connection by plaintiffs' employee. The trial court noted:

> "that the plaintiffs had not negatived effectively other . . . the fault of others in connection with the fire. . . ." *Id.*, at 1107.

The Oklahoma Supreme Court, in construing the trial court's decision, held:

> "We are of the view that what the trial court intended (by his remark quoted above) was that considering all of the evidence in a light most favorable to plaintiffs all reasonable men would agree that the probability the fire resulted from a defect introduced into the furnace by the manufacturer was no greater than the probability that the gas leak was caused by some means outside and beyond the area of the defendants' responsibilities. After reviewing the evidence, we are inclined to agree with the trial court." *Id.*, at 1107.

Not only did the plaintiffs' own employee fail to appear and testify that the installation was improper, but the plaintiff admitted that he "did not know who lighted the furnace"

(*Id.*, 1106). The Supreme Court thus properly distinguished *Marathon* (where the plaintiff testified to proper use of the product) as follows:

> "The battery exploded when being used by the plaintiff for the purpose for which it was intended. There was a strong inference in that case that the battery was in exactly the same condition when it caused the harm to the consumer that it was in when it was transferred from the possession of the manufacturer. No such inference exists in the case presently before the court." *Id.*, at 1107.

When these same rules are applied to the present case, wherein there was substantial evidence of proper maintenance, and wherein there was considerable evidence as to the nature of the defect and cause of the failure, it may be seen that the trial court properly held that, considering all of the evidence in a light most favorable to the plaintiff, all reasonable men would agree that the probability the failure of the radius rod resulted from a defect introduced into the radius rod by the manufacturer was greater than the probability that the failure of the radius rod was caused by some means outside and beyond the area of defendants' responsibilities, and that decision was correctly affirmed by the Tenth Circuit.

In *Marathon*, the Court has stated the rule that the manufacturer's liability is established when it is shown that the plaintiff is injured while using a product for the purpose intended by reason of a defect as to which he is not aware and cannot ascertain by examination, and it is not required that the proof rise to that degree of certainty which will support only one conclusion to the exclusion of others.

In *Schweitzer*, the Court stated that an issue may be submitted to the jury if it is not mere conjecture but would be within the sphere of legitimate and rational inferences from the established facts favorable to the plaintiff.

In *Thompson*, the Court stated that if in considering all of the evidence in a light most favorable to the plaintiff, the trial court finds that all reasonable men would agree that the probability that a defect existing at the time of manufacture caused the damage is greater than the probabiilty that the damage was caused by some means outside and beyond the area of the defendant's responsibility, then the trial court properly submits the case to a jury.

The proof in the present case falls easily within all of the above stated rules. There is a striking resemblance in the evidence in the present case and the evidence produced in the *Schweitzer* case, the only difference being the time that the vehicles were in service, which involves only an issue of fact for the jury. For a reading of the *Schweitzer* opinion, see Appendix.

Petitioners argue furthermore that the Tenth Circuit failed to take the *Thompson* case into consideration, because the decision failed to refer to it. However, *Thompson* was cited in both briefs below and argued by all parties during oral argument. The test of *Thompson* is specifically discussed in the Tenth Circuit decision as follows:

> "While the evidence is not open and shut, and indeed it is not as strong as that which was present in *Marathon*, where the happening bespoke a defect, or as strong as that in *Speed Fastener*, where the activity was so hazardous to render the slightest deviation from precise standards a defect, we nevertheless can-

not say that the trial court erred in holding that a trier of fact could justifiably conclude that the plaintiff's thesis that the manufacturer supplied a defective equalizer bracket-radius rod assembly *was more likely so than not so.* There is present a *logical and rational inference* that the manufacturer and seller were responsible for the defect." (Emphasis added.)

The language emphasized in the quote above is almost verbatim the tests of *Thompson* and *Schweitzer,* and those tests were met in the instant case.

**C. THE DECISION BELOW IS NOT CONTRARY TO APPLICABLE STATE LAW, BECAUSE DEFECTIVE DESIGN WAS AN ISSUE IN THE IMPLIED WARRANTY ACTION, AND THEREFORE THE PETITION SHOULD BE DENIED.**

Petitioners argue that the question of defective design was "injected by the Court of Appeals." *See,* Petition for Certiorari, at page 4. Petitioners also state that "the issue of design was not involved in the trial court's decision. . . ." Petitioners apparently believe either (1) that defective design is not a part of a breach of implied warranty action, or (2) that defective design is no longer in the case since plaintiff dismissed his negligence count, a portion of which involved negligent design. Either belief is incorrect.

The negligence count which was dismissed at the trial, in addition to alleging negligent design, also alleged negligent manufacture and negligent inspection. Because of uncertainty as to the adequacy of proof on the issue of the standard of care (an essential element of a negligence case) the negligence count was voluntarily dismissed. As the trial court noted at page 346 of the Appendix before

the Tenth Circuit, there is "no argument" that a *defective* design under the law constitutes a breach of implied warranty. Therefore, it is clear that, while *negligent* design *was* taken out of the case, *defective* design, as a part of a breach of implied warranty action, remained in the case.

Numerous courts have recognized that defectiveness, for purposes of establishing a breach of implied warranty, may be in design or in manufacture. This was recognized in Oklahoma as early as 1965 with the *Marathon* Court citing *Greenman* with approval as follows:

> "The California Court explicitly held that it was sufficient to establish a manufacturer's liability when it was shown that plaintiff, while using the machine involved in the way it was intended to be used, was injured as the result of a defect in *design* or manufacture which made the machine unsafe, and of which defective condition the plaintiff was unaware.
>
> "We are persuaded as to the correctness of both the reasoning and the rule. . . ."

The Tenth Circuit, before deciding the case below, had already ruled that defective design would establish a breach of implied warranty action. *See, Marshall* v. *Ford Motor Company,* 446 F.2d 712 (10th Cir. 1971). *See also, Lucas* v. *Firestone,* 458 F.2d 495 (5th Cir. 1972).

In summary, petitioners' statements concerning defective design are, like petitioners' statement of facts, at least an adversary statement. The decision below properly considers defective design as a part of the applicable state law of implied warranty.

**Conclusion of Argument**

The decision of the Circuit Court below is neither in conflict with other Circuit Court decisions nor contrary to applicable state law, and therefore, the petition for certiorari should be denied.

## I.
## OPINIONS BELOW

Respondents are satisfied with the Appendix of opinions as appended to the Petition for Certiorari.

## J.
## STATE COURT JUDGMENTS

Review of a state court judgment is not sought, and therefore, this item is not applicable.

## CONCLUSION AND PRAYER

Petitioners have asked this Court to make findings of fact which are contrary to the jury verdict, the trial court's order, and the statement of facts as stated by the Tenth Circuit. Petitioners agree that the Tenth Circuit correctly stated the law, but contend that its "conclusions as to the evidence are in severe conflict with other Circuit Courts." Petition for Certiorari, at p. 6.

In light of the authorities above, it is evident that the decision below is consistent with other circuit court decisions on the same matter and is consistent with the law of Oklahoma governing products liability cases.

WHEREFORE, petitioners respectfully pray that the petition for a writ of certiorari be denied.

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November, 1972

## APPENDIX

### OPINIONS OF SUPREME COURT

Prepared for Publication by the Office of the Chief Justice

FORD MTR. CO. v. SCHWEITZER, a Minor.

No. 43096. June 15, 1971.

*(Not for Publication in Official Reporter)*

Appeal from District Court, Kingfisher County; F. B. H. Spellman, Trial Judge.

Action for damages for breach of implied warranty of fitness against the manufacturer of automobile. From a jury verdict for the plaintiff and a judgment based thereon, defendant appeals. Primary contention: Evidence insufficient to sustain judgment in that no evidence of defect in the car's manufacture, which could be said to have been the proximate cause of the accident, was shown. Secondary contentions of error involves rulings on evidence. Judgment affirmed.

Wm. G. Smith, Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, for plaintiff in error.

Shutler, Shutler, Baker & Simpson, Kingfisher, for defendant in error.

LAVENDER, J. This appeal, by the defendant in the trial court, arises in an action in which the plaintiff, Tommy Joe Schweitzer, a minor acting through his father, sued Ford Motor Company for damages allegedly resulting from a one-vehicle accident.

The vehicle, a Ford Mustang automobile, manufactured by the defendant, had been sold and delivered to the plaintiff, as a new car, twelve days before the accident, by an authorized Ford dealer as to whom the plaintiff dismissed his action when the case was called for trial. It was

being operated by the plaintiff, on a country road, when it left the roadway and collided with the embankment of a ditch, causing personal injuries to the plaintiff and considerable damage to the left-front portion of the vehicle.

The plaintiff's case is based upon an implied warranty of fitness of the car for use for the purposes for which such cars are manufactured, and an alleged breach of that warranty. He alleges that, at the time of the sale and delivery of the car to him, a tie-rod assembly in the steering mechanism, consisting of two ball-and-socket pieces connected together by a threaded tubular connector, was "bent, broken, cracked and otherwise defective," causing the same to function improperly, and that the defective tie-rod was the proximate cause of the car's running off the roadway and of the resulting damages to him.

Various issues were raised by the defendant's amended answer. The defendant's demurrer to the plaintiff's evidence was overruled. The defendant presented its evidence, and, when the plaintiff rested without presenting any further evidence, moved for a directed verdict in its favor. That motion was overruled and the cause was submitted to the jury. Verdict, and judgment, were rendered for the plaintiff in the amount of $6,584.84. The defendant does not attack the amount of the verdict and judgment as being excessive.

The defendant filed a motion for judgment notwithstanding the verdict and, at the same time, filed a motion for a new trial. The trial court overruled both motions, and the defendant appealed to this court by case-made.

The defendant's basic contention on appeal is that the evidence concerning the facts, with the inferences which might reasonably be based thereon, does not justify a conclusion that the tie-rod assembly in question was defective when the car was sold and delivered to the plaintiff and was a proximate cause of the car's running off the roadway and colliding with the ditch embankment. We do not agree.

This contention involves the defendant's motion for a directed verdict in its favor, made at the close of all of the evidence. Under well-established principles of review in such a situation, this court does not weigh the evidence, but considers all of the evidence favorable to the successful plaintiff and ignores all evidence unfavorable to him. See: North American Accident Insurance Company v. Ralls, Executor, (1955), Okl., 288 P.2d 1097, 1099; Fairmont Creamery Company et al. v. Rogers (1941), 189 Okl. 320, 116 P.2d 983, 984.

The pertinent portion of the plaintiff's own testimony may be summarized as hereinafter set forth. At and prior to the time of the accident, he was eighteen years of age, living with his parents about three miles south of Okarche, Oklahoma, and working in Kingfisher, about twelve miles from his parent's home. He had purchased the car involved herein, as a new car, twelve days before the accident, from a named, authorized Ford dealer at Watonga.

During that twelve-day period, all of his driving of the car had been on pavement, black-top or good dirt roads, mostly in going back and forth between his home and his place of work, and just riding around, and he had made one or two trips to Oklahoma City. He had never driven the car over fields or pastures, and had never hit a "high center" with it. On dirt roads, he ordinarily drove from 40 to 55 miles per hour, depending upon the condition of the road. The fastest he had driven the car was "probably" between 70 and 75 miles per hour, one time on the black-top road between Okarche and his home. He had never had any trouble with the steering prior to the time of this accident.

On the night during which this accident occurred, he left Kingfisher for home about 12:30 a.m. He drove west from Kingfisher, on Highway 33, seven miles and turned south on a "dirt" road which, he said, actually was hard clay with some sand in it. It had not rained for some time and there were no ruts in the roadway.

He had driven south on that road about three-quarters of a mile, at about 40 to 45 miles per hour, when he noticed the car "easing" or "veering" (as distinguished from turning) to the right. The right wheels got down onto the slanted near side of the ditch on that side of the road but not all the way to the bottom of the ditch, with the left wheels still on the roadway or shoulder, a foot or so to the left of the ditch. The car traveled in that position for some distance, with him trying to steer it to the left, and giving it more gas, to get back on the roadway. He testified the car would not respond to his attempts to turn the wheel. He did not try to use his brakes. He said that he must have been knocked unconscious by the collision because the next thing he remembers is "coming to" about seven to seven-thirty a.m., with the car wrecked in the ditch on the left-hand side of the road.

A garage owner who was called to tow the car to his place of business in Kingfisher arrived at the scene around eight or eighty-thirty a.m. The car was in the east ditch, headed south but at a slight angle toward the east, with only the right-rear wheel on the roadway. When he pulled the car backwards from the ditch and was looking for a place to hook onto the front end to raise it for towing, he saw a tie-rod assembly in the ditch, about where the back end of the car had been before he moved it. He picked up the tie-rod and, before putting it in the plaintiff's car, noticed that it was rusty colored except for one shiny spot on a corner of the end that would be nearest to the wheel when installed, and that it was badly bent and the stud bolts at each end of the assembly had been broken off.

This witness identified an exhibit as appearing to be the tie-rod assembly that he had picked up from the ditch, but said it had been all shined up since then. He stated that a separate tie-rod assembly connects the steering spindle on each front wheel to the steering arm or bar which, in turn, is connected to the steering column and wheel, so that both

front wheels turn the same way at the same time when the steering wheel is turned; that the one from the plaintiff's car was the left tie-rod assembly; and that, if the left tie-rod is disconnected from the left-front wheel or from the steering arm or bar, the right-front wheel will still be turned either way by movement of the steering wheel. This witness further testified that no other parts of the car were found under it other than the tie-rod.

A representative of Ford Motor Company, who testified for the defendant, identified an exhibit as a new left tie-rod assembly for a Mustang of the model of the plaintiff's car. Using the two tie-rod assemblies, he pointed out where the plaintiff's tie-rod had been bent and twisted out of shape and how much of the stud bolts at each end had been broken off. He also testified that the plaintiff's car had been shipped from an assembly plant to a Ford dealer in Oklahoma City, and would have been driven from there to the Ford dealer's place in Watonga where the plaintiff purchased the car.

The highway patrol trooper who worked the accident testified as a witness for the defendant. He arrived at the scene about 7:45 a.m., and found the plaintiff's car in the east ditch, headed south but at a slight angle to the east. No one was in the car. He measured the tire tracks left by the car. The car had traveled, in a straight line, with the right wheels part way down on the sloped near side of the west ditch and the left wheels on the roadway about as far to the left of the edge of the ditch as the right wheels were to the right of it, for a distance of 240 feet, and then "broad slid" for a distance of 135 feet, across the road at an angle and into the east ditch. The car's movement to the right from the roadway onto the sloping side of the west ditch had been gradual, with nothing to indicate that the wheels had been turned to the right.

The wrecker driver had also observed the tire tracks left by the plaintiff's car. His description of them was sub-

stantially the same as the trooper's, except that he had not made any measurements, and he had noticed a "little streak" some 12 to 14 inches to the right of the left tire tracks where the car had been on the west side of the road with its right wheels on the sloping side of the ditch. Where the car crossed the road at an angle, he didn't see the "little streak," but the track of the left-front wheel was broader than the track of the right-front wheel. He also stated that the track of the left-front wheel went part way up, and along, the far embankment of the east ditch, and that only the right-rear wheel was on the roadway when he arrived at the scene.

In Pennsylvania Glass Sand Corporation of Oklahoma v. Ozment (1967), Okl., 434 P.2d 893, this court held, in the third and fourth paragraphs of its syllabus:

> "The essential elements necessary to establish a cause of action may be inferred from all the facts and circumstances, and where the circumstances are such as to remove the case from the realm of conjecture and place it within the sphere of legitimate and rational inferences from established facts, a prima facie case is made.
>
> "In civil cases the facts are provable by direct or circumstantial evidence, or by both, and it is not required that the proof rise to such degree of certainty as will support but one conclusion to the exclusion of all others."

In the present case, a conclusion that the left tie-rod assembly in the steering mechanism of this car was defective when the car was sold and delivered to the plaintiff and was the proximate cause of the car's running off the roadway and of any resulting damages sustained by the plaintiff, would not be mere conjecture but would be within the sphere of legitimate and rational inferences from the established facts favorable to the plaintiff.

The trial court did not err in overruling the defendant's motion for a directed verdict in its favor.

The defendant contends that the trial court erred in denying its motions for summary judgment under Rule 13 of this court's rules for the guidance of the district, superior, and common pleas courts of this state (Chapter 2 of Title 2, O. S. Supps. 1965-1970). The object of that rule is to avoid a useless trial. Flick, Administratrix v. Crouch et al. (1967), Okl., 434 P.2d 256, 262; Perry v. Green (1970), Okl., 468 P.2d 483, 489. When, as in this case, the trial court denies a defendant's motion for summary judgment and a trial of the issues made by the pleadings is had, at which evidence is adduced supportive of the plaintiff's position, the reason for the rule ceases to exist insofar as that case is concerned. The question becomes academic.

The defendant presents two other propositions. One is that the trial court erred in refusing to admit into evidence certain portions of a deposition offered by the defendant. The other is that the trial court abused its discretion in refusing to permit the defendant's witnesses to use a replica of the suspension system and steering linkage of the plaintiff's car so that any jurors who had no personal knowledge of such things could understand how a tie-rod assembly fits into the suspension and steering systems of such a car and how the one involved herein could have been bent out of shape and broken off by the sudden impact and pressure on it when the left-front wheel of the plaintiff's car collided with the ditch embankment.

There was clear testimony, by the wrecker-driver who testified for the plaintiff, as well as by an expert in the field of fatigue and stresses in metals who testified for the defendant, as to where the two tie rods fit into the steering mechanism of a car. One witness for the defendant used a new, left tie-rod for this model Mustang to show where, and how much, the plaintiff's tie-rod had been bent out of shape and how much of the stud bolts at each end had been

broken off. We do not think that the replica in question was indispensable to the jurors' understanding that it was possible for the sudden stresses of the impact of the left-front wheel of the plaintiff's car against the ditch embankment to have been transmitted through the steering mechanism to the left tie-rod, or to the jurors' determination of the proximate cause of the accident (which was their principal problem). In the circumstances, the trial court did not abuse its discretion in refusing the use of the replica in question.

There is nothing in the case-made to indicate that the deposition involved in the defendant's offer of proof was ever filed in the case. The offer, as made, indicates that the material portions of the proffered testimony would disclose the results of tests made by the witness on the tie-rod involved herein, and the witness' opinion as to the cause of the condition of the tie-rod after the accident. That testimony would have been in harmony with, and cumulative to, the testimony of a qualified expert who testified for the defendant. The offer did not include any mention of the qualifications of the deposing witness as an expert in any field. Any error in rejecting the proffered portions of the deposition in question was not prejudicial to the defendant, so is not ground for reversal of the judgment (12 O.S. 1961 §78; 22 O.S. 1961 §1068).

Affirmed.

All Justices concur.